Supreme Court, U.S.
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No. 97-49

In The

SUPREME COURT OF THE UNITED STATES
October Term, 1997

PORTLAND GENERAL ELECTRIC COMPANY,

Petitioner,

v.

COLUMBIA STEEL CASTING CO., INC.

Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF ON ISSUES RAISED IN PETITIONER'S RESPONSE TO THE SOLICITOR GENERAL'S BRIEF

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Parties To The Proceeding

There have been no changes to the list of parties reported in Columbia Steel Casting Co., Inc.'s previous brief.

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Introduction

The arguments in Petitioner's Response to the Solicitor General's Brief twist the state action doctrine and ignore twenty years of decisions applying that doctrine. The state action doctrine applies only when anticompetitive conduct truly is part of "a deliberate and intended state policy," rather than mere inadvertence on the part of the state. *Federal Trade Comm'n v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992). Under the ruse of "federalism," Petitioner urges this Court to adopt a standard for state action immunity that is indifferent as to whether monopolists truly are acting pursuant to state policy. The Court should decline the Petition.

Much of Petitioner's Response reasserts arguments raised in prior briefing. Respondent will not address those arguments specifically but, instead, will

rely on its briefs in this matter. Petitioner's federalism arguments, however, are particularly misleading and warrant a response.

As the United States as Amicus Curiae makes clear, the court below faithfully followed this Court's decisions interpreting the state action doctrine. This case presents no occasion to develop a new standard for state action immunity.

Argument

Petitioner's emphasis on federalism is misplaced. This is an antitrust case involving the state action doctrine. The lower court correctly applied the governing standard of *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), addressing whether the Petitioner's monopoly was part of a clearly articulated and affirmatively expressed state

policy. That standard balances the need for vigorous antitrust enforcement against principles of federalism.

The application of the *Midcal* standard, as advocated by the United States, does not interfere with Oregon law. The Oregon legislature has enacted a clear statutory scheme. Under Oregon law, exclusive service territories for utilities are permissible only when the Oregon Public Utility Commission (OPUC) approves an application for an exclusive service territory. Or. Rev. Stat. § 758.450(1) ("Territory served by more than one person providing similar utility service may only become an allocated territory by a contract approved by the Public Utility Commission."). Thus, Petitioner's conduct will satisfy the *Midcal* standard only if the OPUC clearly articulated and affirmatively expressed a policy to displace competition with allocated exclusive

service territories in Portland. The Ninth Circuit correctly found that the OPUC never approved a territorial allocation for Petitioner in Portland.

To support its federalism argument, Petitioner isolates one passage of the United States' brief. That passage in turn quotes the opinion on rehearing of the Ninth Circuit Court of Appeals, referring to "the relevant statutory process." The requirement of OPUC approval of territorial allocations — the relevant statutory process — is a key part of the state policy at issue here. In determining whether a private actor's monopolization is part of state policy, the Court cannot overlook Oregon's legislative policy that all monopolies are subject to OPUC review and approval through the established statutory process.

Principles of federalism are respected in the decisions below. This is not a case of a federal court reviewing compliance with state law, as Petitioner argues. Instead, the courts below properly focused on whether the state, through the OPUC, clearly and affirmatively sanctioned the anticompetitive conduct. Because it did not, the state action doctrine does not apply.

Petitioner is simply wrong on the facts in suggesting that the OPUC prohibited competition for electric service in Portland. But Petitioner's erroneous factual characterizations are of no significance. The facts as characterized by Petitioner do not demonstrate a clearly articulated and affirmatively expressed state policy to permit the monopolization at issue here.

Permitting immunity based on any standard short of clear articulation and affirmative expression, as Petitioner urges, would seriously weaken the function of the *Midcal* test to ensure that private anticompetitive conduct truly is part of a state regulatory policy. In addition, weakening the first leg of the *Midcal* standard would invite scrutiny into the intent of state policy makers, a process that the clear standards in *Midcal* were intended to avoid.

Southern Motor Carriers Rate Conf., Inc. v. United States, 471 U.S. 48 (1985), does not bolster Petitioner's federalism claim. Contrary to Petitioner's assertions, the United States does not argue that state policy must require, rather than permit, anticompetitive conduct. The United States has not argued that the Oregon statutes must compel the anticompetitive

conduct. Petitioner merely advances that fallacy to gloss over the fact that the "clear articulation" leg of the *Midcal* test was not met in the OPUC's order. As noted above, Oregon has not adopted a policy of permitting monopolization throughout the state. The legislature has delegated the determination of whether to permit monopolization to the OPUC, to be made on a case by case basis. The first leg of the Midcal test can be effectuated only by examining whether the OPUC clearly articulated and affirmatively expressed permission for the monopolistic conduct at issue in this case. As the Solicitor General and the Ninth Circuit correctly point out, the OPUC had its own doubts about the clarity of its 1972 Order. Brief for the United States as *Amicus Curiae*, at 18. These doubts are not surprising because the OPUC's own lawyer (and the next

Commissioner) filed an affidavit in the district court indicating that the 1972 OPUC Order was not intended to create exclusive territories.

The Solicitor General is not advocating federal-court review of state regulatory activity. To the contrary, the Solicitor General is urging adherence to the standard that always has been the foundation of this Court's state action analysis: For immunity to apply, the state must clearly articulate and affirmatively express its sanction of the particular anticompetitive conduct at issue. Under the unique facts of this case, that standard has not been met.

Conclusion

The positions taken by the United States are neither novel nor controversial. The United States simply argues that the appropriate standard in this case is

the *Midcal* test, as it has been applied in numerous other cases. Because the court below properly applied that test, and because the result is in large part dependent on the unique facts of this case, there is no reason to grant Certiorari.

Respectfully submitted,

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